BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
APR 30 2018
WORKERS' COMPENSATION

RANDON SUTER, Claimant, vs. UNITED PARCEL SERVICE, Employer, and LIBERTY MUTUAL INSURANCE, Insurance Carrier, Defendants.	File No. 5056352 ARBITRATION DECISION Head Note: 1803

STATEMENT OF THE CASE

Claimant, Randon Suter, filed a petition for arbitration seeking workers' compensation benefits from United Parcel Service (hereinafter, UPS), the employer and Liberty Mutual Insurance, the insurance carrier.

The matter came on for hearing on September 20, 2017, before Deputy Workers' Compensation Commissioner Joseph L. Walsh in Davenport, Iowa. The record in the case consists of Claimant's Exhibit 1; Defense Exhibit A; Joint Exhibits 1 through 12; as well the sworn testimony of claimant, Randon Suter and defense witnesses Kyle Russel and Ryan Driefurst. Jane Weingart was appointed as the court reporter for the proceedings. The parties briefed this case and the matter was fully submitted on October 23, 2017.

ISSUES AND STIPULATIONS

The following issues and stipulations were submitted.

The parties have stipulated to most matters in this case and have done an excellent job of narrowing the issues for determination. The stipulations presented in the hearing report are accepted and are binding upon the parties. It is stipulated that claimant suffered an injury to his left shoulder on January 27, 2015, and a second injury on October 12, 2015, to his right shoulder. It is stipulated that both of these injuries

arose out of and in the course of employment. It is further stipulated that both of these injuries are properly under one file number, File No. 5056352. Both injuries resulted in some temporary and permanent disability, although claimant is not claiming any entitlement to additional temporary benefits. The parties stipulated to the elements comprising claimant's rate of compensation. His rate of compensation for the January 27, 2015, work injury is $208.71. His rate of compensation for the October 12, 2015, work injury is $191.78. The claimant is not seeking any additional medical expenses. Affirmative defenses have been waived. The parties have stipulated that claimant has been paid 52.571 weeks of benefits for the January 2015, work injury, and 25 weeks for the October 2015, work injury.

The primary issue submitted for determination is the extent of claimant's industrial disability from the two injuries. In addition, the defendants have denied payment for the independent medical examination expenses set forth in Claimant's Exhibit 1.

FINDINGS OF FACT

Randon Suter is a bright, pleasant, 24-year-old-sorter for UPS. He testified live and under oath at hearing. I find his testimony to be generally credible. His testimony was consistent with his deposition testimony. (Defendants' Exhibit A) His testimony was consistent with the medical documentation in the file. There was nothing about his demeanor which caused me any concern about his truthfulness. He presented well at hearing and appears to be bright and employable.

Mr. Suter is a high school graduate. He testified that he did well in high school. He is not married and he has no children. He has worked for UPS since July 2010. He began at UPS in July 2010 as a loader while he was in high school earning $8.50 per hour. The loader position is part time. After high school, claimant also held other jobs while simultaneously working part time at UPS. He performed work at a restaurant washing dishes, drywall construction work, auto detailing work and work at an auto body shop, tracking parts. He eventually promoted into a more skilled position at UPS as a puller. As of the date of hearing, he was earning $16.20 per hour.

On January 28, 2015, Randon was sorting packages for the employer in this case, UPS. He lifted a bag with his left arm, and as he was reaching and tossing it behind him, he felt an immediate onset of sharp pain in his left shoulder. He reported the work injury and was directed for treatment at Genesis Occupational Health. He was placed on light duty and provided with medications and physical therapy. While on light duty, Mr. Suter performed the same type of sorting work with lighter packages. He underwent a normal course of treatment, eventually receiving an MRI, which demonstrated a large labral tear. He underwent arthroscopic shoulder surgery on April 29, 2015, by Ryan Dunlay, M.D., and resumed physical therapy shortly thereafter. While recuperating from the surgery, Mr. Suter also resumed light-duty work, which was essentially all performed with his left arm. During this period of time, he began to have significant, ongoing pain in his right shoulder which is documented in the physical

therapy records.

In October 2015, Dr. Dunlay released claimant to work with no restrictions. He continued physical therapy. On or about October 12, 2015, while reaching for a heavy box, Mr. Suter felt significant pain in his right shoulder. He was taken off work on October 19, 2015, for a period of time because of the pain. Subsequently, Mr. Suter followed up with Dr. Dunlay, who could not find any explanation for his ongoing pain. On October 30, 2015, another MRI of the left shoulder was performed which showed the post-surgical changes. In November 2015, Dr. Dunlay ordered work hardening. In December 2015, he was allowed to work with a 50-pound restriction.

In January 2016, Dr. Dunlay ordered an MR arthrogram of the right shoulder which showed a large "nearly-circumferential labral tear". (Joint Exhibit 3, page 19) On January 15, 2016, Dr. Dunlay then released Mr. Suter back to full duty related to the left shoulder. Follow up treatment continued on the right shoulder.

Claimant sought an independent medical evaluation (IME) with Theron Jameson, D.O., in April 2016. Dr. Jameson accurately and thoroughly summarized Mr. Suter's course of treatment up to that point in time. (Jt. Ex. 7, pp. 2-7) He performed an examination of both shoulders and then provided expert medical opinions. He opined that "Mr. Suter's right shoulder condition was more likely than not caused by his employment at UPS." (Jt. Ex. 7, p. 8) As to the left shoulder, he concurred with Dr. Dunlay's impairment rating (1 percent whole body), however, unlike Dr. Dunlay, he recommended some permanent restrictions (no work above chest level on the left with a 50-pound restriction). (Jt. Ex. 7, pp. 8-9) The employer had never obtained any impairment rating prior to this.

Defendants had Mr. Suter evaluated by Fred Pilcher, M.D., on January 28, 2016. He agreed that the right shoulder condition met the appropriate medical causation standards. (Jt. Ex. 8) A few days later, on July 1, 2016, Dr. Dunlay assigned a 1 percent whole body impairment related to the January 2015, work injury. (Jt. Ex. 3, p. 23)

Thereafter, Mr. Suter was referred for treatment on the right side to Abdul Foad, M.D. On August 8, 2016, Dr. Foad performed arthroscopic surgery on the right shoulder. (Cl. Ex. 5, p. 3) Again, Mr. Suter underwent physical therapy and a normal course of postoperative treatment. In January 2017, Mr. Suter returned to his position at UPS with no restrictions. In February 2017, Dr. Foad formally released Mr. Suter from care to return to work with no restrictions. (Jt. Ex. 5, p. 11)

Dr. Jameson reevaluated claimant on March 18, 2017. He provided a 2 percent whole body disability rating and recommended lifting restrictions of no more than 50 pounds or above chest height. (Jt. Ex. 9)

CONCLUSIONS OF LAW

The first question is the nature and extent of claimant's industrial disability.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

When an injury occurs in the course of employment, the employer is liable for all of the consequences that "naturally and proximately flow from the accident." Iowa Workers' Compensation Law and Practice, Lawyer and Higgs, section 4-4. The Supreme Court has stated the following. "If the employee suffers a compensable injury and thereafter suffers further disability which is the proximate result of the original injury, such further disability is compensable." Oldham v. Scofield & Welch, 222 Iowa 764, 767, 266 N.W. 480, 481 (1936). The Oldham Court opined that a claimant must present sufficient evidence that the disability was naturally and proximately related to the original work injury.

As an initial matter, I note that I accepted the stipulation of the parties that the claimant suffered two distinct work injuries, the first to his left shoulder on or about January 27, 2015, the second to his right on or about October 12, 2015. This stipulation is accepted, however, the greater weight of evidence supports a finding that the right shoulder is a sequela injury of his left shoulder. In essence, there was, in fact, a second injury, the permanency is more appropriately assessed against the original claim since all of claimant's disability ultimately arose from his January 2015, work injury. Therefore, all of the permanent disability benefits are assessed against the January 2015, work injury.

As a result of his January 2015, work injury, which led to permanent partial

disabilities in both shoulders, I find the claimant suffered a 30 percent industrial disability.

The claimant is 24 years old and he is bright. He is right handed. At this time, he only has a high school education, although he is a good candidate for retraining or further education. Overall, he did have fairly good outcomes from both surgeries. His recovery process between the two injuries lasted nearly two years. His impairment ratings are minimal, and neither treating physician gave permanent restrictions. The restrictions recommended by Dr. Jameson are probably wise. I suspect that if claimant was to perform work lifting more than 50 pounds repetitively or doing a substantial amount of above-shoulder work, his condition would worsen. Fortunately, for both parties, Mr. Suter is bright and has been able to work his way into a more skilled position at UPS due to his ability to learn the UPS process, which required learning many zip codes and mentally processing significant amounts of information quickly as he directs packages. (Ex. A; Tr., p. 13) The combination of the two shoulder injuries definitely makes his overall disability slightly worse.

Considering all of the factors of industrial disability, I find that the claimant has suffered a 30 percent disability as a result of his January 2015, bilateral shoulder injury. This entitles him to 150 weeks of benefits commencing on February 15, 2016. Defendants are entitled to a credit for benefits paid.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

The defendants argue that claimant had not received an impairment rating when he was evaluated by Dr. Jameson. Consequently, the statutory requirements of Section 85.39 are inapplicable. I disagree. While there is no doubt that no numerical rating was made by any company-retained physician, Dr. Dunlay had released the claimant from his care without restrictions. I find this is tantamount to a zero rating.

ORDER

THEREFORE IT IS ORDERED:

Defendants shall pay the claimant one hundred fifty (150) weeks of permanent partial disability benefits at the rate of two hundred eight and 71/100 dollars ($208.71) per week from February 15, 2016.

Defendants shall pay accrued weekly benefits in a lump sum.

Defendants shall pay interest on unpaid weekly benefits awarded herein as set forth in Iowa Code section 85.30.

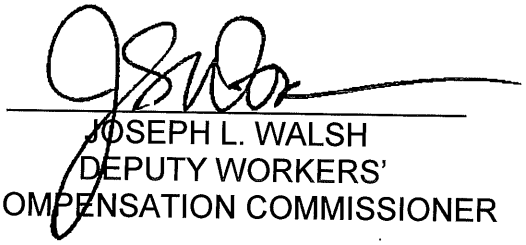
Defendants shall be given credit for the weeks previously paid as set forth in the stipulations.

Defendants shall pay the IME costs.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Costs are taxed to defendants.

Signed and filed this 30th day of April, 2018.



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Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be in writing and received by the commissioner's office within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday. The notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 1000 E. Grand Avenue, Des Moines, Iowa 50319-0209.